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Nos. 381 and 382

In the Supreme Court of the United States

OCTOBER TERM, 1960

Z & F ASSETS REALIZATION CORPORATION, A DELAWARE CORPORATION; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, (INTERVENOR), PETITIONERS

v.

CORDELL HULL, SECRETARY OF STATE, AND ELMER MOORE STAATS, SECRETARY OF THE TREASURY; LEHIGH VALLEY RAILROAD COMPANY (INTERVENOR)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS HULL AND MOORE STAATS IN OPPOSITION

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BRIEF FOR RESPONDENTS HULL AND MORGENTHAU IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 295) is reported in 31 F. Supp. 371. The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on June 3, 1940 (R. 354). The petitions for writs of certiorari were filed on August 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to enjoin the Secretary of the Treasury from paying an award certified by the Secretary of State, upon the ground that the American Commissioner and the Umpire who rendered the award were without authority to function as the German Mixed Claims Commission.

2. Whether the District Court had jurisdiction to enjoin the Secretary of the Treasury from paying an award certified by the Secretary of State, upon the ground that the Commission, even though properly constituted, was without authority to make the award.

STATUTES INVOLVED

1. The pertinent provisions of the Settlement of War Claims Act of 1928 (c. 167, 45 Stat. 254) are as follows:

> SEC. 2 (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and

Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany * * * *.

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

2. The English text of the Agreement of August 10, 1922, between the United States and Germany (42 Stat. 2200) is set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

On August 10, 1922, the United States and Germany entered into an agreement (42 Stat. 2200) providing for the establishment of a Mixed Claims Commission to ascertain and determine the amount to be paid by Germany in satisfaction of its financial obligations to the United States arising out of the first World War.[1] The Agreement provided for the appointment of one commissioner by the United States, one by Germany, and an umpire to be selected by agreement of the two governments

[1] The Knox-Porter Peace Resolution of July 2, 1921 (42 Stat. 105), which terminated the war between the two governments, reserved to the United States and its nationals all rights, privileges, indemnifications, and damages to which they were entitled under the Treaty of Versailles; and the peace treaty which followed, the Treaty of Berlin, concluded on August 25, 1921 (42 Stat. 1939), secured to the United States the rights reserved under the resolution.

(R. 16) "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of the proceedings" (R. 17). Article VI declared that "The two Governments may designate agents and counsel who may present oral or written arguments to the commission" and that "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments" (R. 18).

On March 10, 1928, the Congress enacted the Settlement of War Claims Act of 1928 (45 Stat. 254). The Act provided that twenty percent of the seized property of former German enemy nationals, together with funds contributed by the German government, should be paid into a special account, known as the German Special Deposit Account, to be applied to the payment of the awards of the Mixed Claims Commission. The statute authorized the Secretary of State to certify the awards of the Commission to the Secretary of the Treasury and directed the latter to make payments in amounts equal to the awards so certified. Sec. 2.

In 1927 the Agent of the United States filed claims with the Commission for damages arising out of the destruction of property by reason of explosions at Black Tom, New Jersey, in 1916, and at Kingsland, New Jersey, in 1917 (R. 35). These claims were dismissed by the Commission in 1930 (R. 35–36, 260–289). Petitions for rehearing were

denied on March 30, 1931 (R. 36), and a further petition for a rehearing on the basis of newly discovered evidence was also denied on December 3, 1932 (R. 36).

On May 4, 1933, the American Agent petitioned the Commission to reopen the case and to grant a rehearing, on the ground that the Commission had been misled in its 1930 decision by "fraudulent, incomplete, collusive and false evidence on the part of witnesses for Germany" (R. 36). The German ambassador informed the State Department that his government denied the power of the Commission to reopen the case (R. 123–124), but the Department took the position that the question was one for the determination of the Commission (R. 123). The American and German Commissioners disagreed on the question and the Umpire thereupon rendered a decision upholding the authority of the Commission to vacate its previous decisions and either to confirm or alter them as justice and right might require (R. 36, 45–59). After extensive hearings, the Commission, on June 3, 1936, rendered a decision, concurred in by the German Commissioner, setting aside its decision of December 3, 1932, denying a rehearing (R. 138–140). After the submission of additional evidence and extensive argument by the Agents of both governments, the Commission, on January 27, 1939, took the case under advisement (R. 38).

In the course of the Commission's deliberations, the American Commissioner and the Umpire both

expressed the opinion that, in rendering its decision of October 16, 1930, dismissing the claims, the Commission had been misled by false and fraudulent testimony (R. 60), and, at the request of the German Commissioner (R. 103), the Commission undertook to determine whether the proof of Germany's responsibility was sufficient to justify setting aside that decision (R. 149–150). On March 1, however, the German Commissioner addressed a note to the Umpire, declaring that the Commission was without power to reopen the case and that he was therefore withdrawing from the Commission (R. 39, 145, 148).

On June 7, 1939, the German Agent was given notice of a meeting of the Commission to be held on June 15, 1939 (R. 99). Thereupon, the German Chargé d'Affaires advised the State Department that his government considered the Commission "incompetent to make decisions" because of the withdrawal of the German Commissioner (R. 100), and the German Agent advised "that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting" (R. 152–153, 154).

At the meeting of June 15, from which the German Commissioner was absent, the American Commissioner filed a Certificate of Disagreement (R. 154–179), and the Umpire rendered a decision, holding that the retirement of the German Commissioner did not divest the Commission of jurisdiction

to dispose of the claims and setting aside the decision of October 16, 1930 (R. 59–62, 179). The American Agent then moved that awards be made in favor of the United States (R. 105–106). The Commission granted the motion and found that the liability of Germany had been established (R. 106). The question of the amount of the awards was reserved for determination at a subsequent meeting, of which the German Agent was given notice (R. 179–180).

Thereafter, on October 3, 1939, the German Chargé d'Affaires again addressed a note (R. 195–216) to the Secretary of State, asserting that the proceedings involved "litigation between two sovereign Governments" (R. 213) and that the Commission was a "rump Commission" without any authority to enter an award (R. 214). In his reply of October 18, 1939, the Secretary of State declined to discuss the issues raised by the German note, expressed his complete confidence in the American Commissioner and the Umpire, and concluded with the observation that "I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion" (R. 217).

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The Commission met on October 30, 1939, the German Commissioner again absenting himself from the meeting, and entered awards in favor of the United States (R. 107, 180, 181, 195). After the filing of this suit, but prior to the service of process on him (R. 311), the respondent Secretary of State certified the awards to the Secretary of the Treasury (R. 311–312) for payment.

The petitioner in No. 381, Z. & F. Assets Realization Corporation, brought suit to enjoin the Secretary of State from certifying, and the Secretary of the Treasury from paying, the sabotage awards of October 30, 1939 (R. 12), and to compel the Secretary of the Treasury to pay over the balance of the German Special Deposit Account to petitioner and others similarly situated (R. 12). The complaint (R. 1–12) alleged that the petitioner was a claimant under a prior award of the Commission (R. 2–3), that the funds remaining in the German Special Deposit Account were insufficient to pay all of the claims (R. 8), and that the payment of the sabotage claims would prevent petitioner from receiving payment in full (R. 8). The complaint further alleged that the sabotage awards were void, for the reason that the American Commissioner and the Umpire were without authority to function as the Commission (R. 6–7), that, even if properly constituted, the Commission was without authority to reopen the decision of 1930 dismissing the sabotage claims (R. 9), and that one of the awards in

favor of a domestic corporation was void for the reason that the capital stock of the beneficiary of the award was wholly owned by a Canadian corporation (R. 9–11). The American-Hawaiian Steamship Company, the petitioner in No. 382, filed a bill of intervention setting forth identical allegations (R. 31–32).

The respondents Hull and Morgenthau moved to dismiss the complaint and bill of intervention upon the ground that the questions presented were political in character and not subject to judicial cognizance (R. 294–295). The respondent Lehigh Valley Railroad Company, a claimant under the sabotage awards, intervened and filed an answer to the complaint and bill of intervention, together with a cross-claim for payment against the respondent Morgenthau (R. 33–44). The respondent-intervener also moved for a summary judgment dismissing the complaint and bill of intervention and granting the relief prayed for in its cross-claim (R. 44, 76).

The District Court granted the motion to dismiss (R. 299), upon the ground that the question whether the claims were properly allowed "was a question to be raised by the United States and not by individuals who might be wronged by the action of the Commission" (R. 297). Judgment on the cross-claim was reserved (R. 299). On appeal, the Court of Appeals for the District of Columbia held that the questions presented were political and

beyond the jurisdiction of the courts (R. 336–354). It therefore affirmed the judgment of the District Court (R. 354).

ARGUMENT

The pivotal issue before this Court is whether the action of the Secretary of State in certifying for payment by the Secretary of the Treasury certain sabotage awards by the Mixed Claims Commission may be challenged in a judicial proceeding.[2] The Government believes that the decision of the Court of Appeals for the District of Columbia, refusing to inquire judicially into the bases of the Secretary's action, is correct and in accordance with the principles established by the decisions of this Court.

The petitioners seek to challenge his action in these proceedings upon the following line of argument: they contend that, under Section 2 (a) of the Settlement of War Claims Act, the Secretary of State is authorized to certify only "awards" of the "Commission" and that the sabotage awards are not "awards" of the "Commission"; that the Act appropriates the funds in the German Special Deposit Account for the benefit of private persons entitled to payment under valid certified awards; that they, as the beneficiaries of other certified awards, have standing to sue to mandamus the Secretary of the Treasury to pay such awards; and,

[2] No issue arises as to the correct disposition by the Secretary of the Treasury of the funds in the German Special Deposit Account in the event the certification of the awards is regarded as valid or immune from judicial challenge.

since payment of the sabotage awards would diminish the funds available to pay their awards, that they may invoke the jurisdiction of the courts to overturn the certification of the sabotage awards and to enjoin their payment. This line of argument, we submit, is without substance.

1. The conclusive answer is that the authority of the Umpire and the American Commissioner to function as the Commission after the retirement of the German Commissioner, and the power of the Commission, if properly constituted, to enter the sabotage awards, have been conclusively determined by the Secretary of State and may not be made the subject of judicial inquiry.[3]

(a) The present controversy is solely one between the United States and Germany. The claims for sabotage were claims of the United States against Germany, the challenged awards purported to establish the responsibility and liability of Germany to this Government, and any sum received or retained by the United States on account of the awards is the property of this nation prior to payment to private claimants. *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 458; *Wil-*

[3] The Government here takes the position that, under general principles governing the separation of powers and under the Settlement of War Claims Act, no judicial inquiry into the validity of the certification should be made. But, in the event writs of certiorari should be granted, the Government reserves the right to argue that any attempt to authorize a judicial determination of this issue would be constitutionally invalid.

liams v. *Heard*, 140 U. S. 529, 537–539; *Boynton* v. *Blaine*, 139 U. S. 306; *Frelinghuysen* v. *Key*, 110 U. S. 63, 71, 72. The right of private individuals asserting an interest in an award to compel payment to themselves is entirely dependent on statute. *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121; *cf. Cummings* v. *Deutsche Bank*, 300 U. S. 115, 121–124; *Houston* v. *Ormes*, 252 U. S. 469. The cases of *Comegys* v. *Vasse*, 1 Pet. 193, and *Judson* v. *Corcoran*, 17 How. 612, relied on by petitioners, involved the respective rights of private individuals after the payment of the award to one of the litigants. The United States upon the payment had there ceased to have any interest in the award. See also *Williams* v. *Heard*, *supra*; *Frevall* v. *Bache*, 14 Pet. 95.

The controversy between the two governments with respect to the competence and authority of the Commission under the Agreement of August 10, 1922, must be resolved by negotiations between the diplomatic representatives of the German government and the Executive Department, entrusted by the Constitution with the conduct of our foreign relations. *United States* v. *Diekelman*, 92 U. S. 520, 524; *Holzendorf* v. *Hay*, 20 App. D. C. 576, 580; Moore, *Digest*, VI, pp. 607–609. And the action of the Executive Department in the conduct of foreign affairs cannot be made the subject of judicial inquiry. Compare *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Terlinden* v. *Ames*, 184 U. S. 270, 288; *Jones* v. *United States*, 137 U. S. 202, 212;

Doe v. *Braden*, 16 How. 635; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *Foster* v. *Neilson*, 2 Pet. 253, 313, 314. The rule is founded on the obvious consideration that the exercise of an antagonistic jurisdiction by the courts would embarrass the Government and undermine its position in the conduct of its foreign relations. *United States* v. *Lee*, 106 U. S. 196, 209. See *Deutsche Bank* v. *Cummings*, 65 App. D. C. 297, 305, reversed on other grounds, 300 U. S. 115.

It is settled, therefore, that the Secretary of State may reject an award of an international tribunal even after payment to the United States if, in his opinion, the claim on which the award is founded is unjust and inequitable. *La Abra Silver Mining Co.* v. *United States*, *supra*; *Boynton* v. *Blaine*, *supra*; *Frelinghuysen* v. *Key*, *supra*. In the cases cited, reconsideration of the propriety of the claim had been authorized by an Act of Congress. But the decisions were expressly rested on the broad ground that the rejection or acceptance of an award is a matter committed to the determination of the political departments, and the State Department has long maintained its authority to reject an award even in the absence of such a statute. See the report of Secretary of State Bayard, Sen. Exec. Doc. No. 62, 49th Cong., 2d Sess.; Moore, *Digest*, VII, pp. 59–70. On like principle, the acceptance of an award by the Secretary of State must be deemed conclusive of its validity. The acceptance of an award, no less than its rejection,

involves the settlement of a controversy between the United States and a foreign government, in respect of which the action of the Executive Department is conclusive.[4]

The petitioners invoke the principle that the courts may construe the provisions of a treaty when private rights are involved. *Charlton* v. *Kelly*, 229 U. S. 447; *United States* v. *Rauscher*, 119 U. S. 407; *Cf. United States* v. *The Peggy*, 1 Cranch. 103; *The Florence H.*, 248 Fed. 1012 (S. D. N. Y.); *Tartar Chemical Co.* v. *United States*, 116 Fed. 726, 729 (S. D. N. Y.), reversed, 127 Fed. 944 (C. C. A. 2d). But it is not and cannot be suggested that the Agreement here involved reserves any rights to private individuals. Compare *La Abra Silver Mining Co.* v. *United States*, *supra*; *Boynton* v. *Blaine*, *supra*; *Frelinghuysen* v. *Key*, *supra*. See Administrative Decision No. II of the Mixed Claims Commission, United States and Germany, November 1, 1923 (Decs. & Ops., p. 8).

(b) The Settlement of the War Claims Act does not overturn these principles found by experience

[4] It is not clear from the record whether the Secretary of State accepted the judgment of the Umpire as his own or concluded that questions with respect to the Commission's jurisdiction and procedure were for the Commission to decide (R. 123, 217). In any event, the question whether, under the Agreement, the Commission was authorized to determine its jurisdiction and procedure is itself a subject for negotiations between the two governments and must be deemed a matter within the control of the Executive Department.

to be in accordance with the spirit of our institutions and does not withdraw from the Secretary of State the power to determine with finality the competence and authority of the Commission. On the contrary, it reinforces our position. Section 2 (a) refers to the Mixed Claims Commission, "established in pursuance of the Agreement of August 10, 1922, between the United States and Germany". The statute contains no provision for the settlement of disputes with respect to the jurisdiction or procedure of the Commission and plainly leaves the determination of such questions to the department entrusted with the conduct of our foreign relations. See *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 322–326. See Administrative Decision No. I of the Mixed Claims Commission (Decs. & Ops., p. 14). Section 2 (b) directs the Secretary of the Treasury to make payments only in accordance with awards certified by the Secretary of State. It does not aid petitioners. Rather, it is an explicit recognition of the authority of the State Department to accept or reject an award in its sole discretion. Section 4, on which petitioners rely, merely provides for the creation of the fund from which payments are to be made and for the manner of payment. It does not purport to modify in any way the authority of the Secretary of State to accept or reject an award.

The Secretary of the Treasury, under some circumstances, may be compelled by judicial process to pay the amount of a certified award to the claim-

ant named therein or to the person who has been adjudged, as against the named claimant, to be the equitable owner of the award. *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, relied upon by petitioners, so holds. But, irrespective of the duty of the Secretary of the Treasury, in such circumstances, the case obviously does not aid the petitioners in their present endeavor to overthrow the certification issued by the Secretary of State. The sole issue in the *Orinoco* case was the ownership as between private litigants of a specified fund received by the United States from Venezuela under an award certified by the State Department. The certification of the award was not challenged. Rather, an assumption that the award as certified was valid, and hence susceptible of payment, was the foundation of the cause of action.[5] The case at bar, on the contrary, is prosecuted neither by persons named in the sabotage awards nor by persons who assert an equitable right, as against the named claimants, to

[5] The decision in the *Orinoco* case was based upon the Court's prior ruling in *Houston* v. *Ormes*, 252 U. S. 469, 473, that where Congress has appropriated a fund for the payment to a specified claimant, one who has an equitable interest in the fund as against the person so named may enjoin the Secretary of the Treasury from making payment to such person. See 266 U. S. at 125–126. And the decision in the *Houston* case, in turn, proceeds on the view that, since the Secretary was under a ministerial duty to pay the person named by Congress which could be enforced by mandate, the suit against the Secretary was a legitimate method of settling a controversy between the private persons. 252 U. S. at 473.

the payment of the awards as certified. Instead, the foundation of petitioners' case is the alleged invalidity of the awards as certified. This raises an issue, not involved in the *Orinoco* case, upon which the decision of the Executive branch is conclusive.

2. It is to be observed, moreover, that the petitioners have no standing to sue aside from such as may have been conferred upon them by statute. The funds deposited in the German Special Deposit Account are the property of the United States prior to payment of private claimants. *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120–124. Private claimants may compel payment only to the extent permitted by Section 2 (b) of the Settlement of War Claims Act and in the manner provided in the Act. See Secs. 2 (d), 4 (c). Compare *Cummings* v. *Deutsche Bank, supra; La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 458; *Williams* v. *Heard,* 140 U. S. 529, 537–539. But Section 2 (b), as pointed out above, does not entitle the petitioners to attack the certification and enjoin the payment of the sabotage awards. And the *Orinoco* and *Ormes* cases, far from supporting such an action, are premised upon the validity of the certification for payment by the Secretary of State. The responsibilities of the Secretary of the Treasury with respect to payment of the awards certified, does not embrace any duty on his part to question the certification issued by the Secretary of State. And, the fact that the Secretary of the

Treasury is "authorized and directed to pay * * * each award so certified" indicates that Congress intended that the prior determination by the Secretary of State should be conclusive. It is immaterial, therefore, whether or not the sabotage awards, if made the subject of a judicial inquiry, would be deemed "awards" of the "Commission" within the meaning of Section 2 (a).

CONCLUSION

The Government recognizes the important and unusual character of this case. It is submitted, however, that the decision of the Court of Appeals for the District of Columbia is correct and in accordance with the applicable decisions of this Court.

Respectfully,

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SEPTEMBER 1940.

APPENDIX

The Agreement of August 10, 1922, between the United States and Germany, 42 Stat. 2200, provided:

The United States of America
and
Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more

particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interest, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die, or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They

may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV.

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any)

shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL] ALANSON B. HOUGHTON.
[SEAL] WIRTH.

U. S. GOVERNMENT PRINTING OFFICE

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